

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH E. ROBERTS, JR. and DEPARTMENT OF THE NAVY,
NAVSEA FIELD OFFICE, Goose Creek, S.C.

*Docket No. 97-2279; Submitted on the Record;
Issued June 23, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation benefits in the amount of \$11,410.29, for which he was without fault; and (2) whether the Office properly denied waiver of recovery of the overpayment.

The Board has duly reviewed the case on appeal and finds that the Office properly determined that appellant received an overpayment of compensation benefits in the amount of \$11,410.29 for which he was without fault.

Appellant filed a claim on October 5, 1995 alleging that he had developed a loss of hearing due to factors of his federal employment. Appellant requested a schedule award on that date. In response to inquiries from the Office, appellant stated that he previously received a schedule award for 18 percent loss of binaural hearing. By decision dated December 10, 1996, the Office granted appellant a schedule award for 18 percent bilateral loss of hearing. On January 14, 1997 appellant, through his attorney, again notified the Office that he had previously received a schedule award for 18 percent bilateral loss of hearing in November 1993 under a different claim number. On February 24, 1997 the Office issued a preliminary notice of overpayment. Appellant returned two checks from the Office totaling \$3,993.36. By decision dated April 3, 1997, the Office found that appellant was without fault in the creation of the overpayment in the amount of \$11,410.29 as he did not know that the schedule award was not for additional loss of hearing. The Office found that appellant was not entitled to waiver as his assets exceeded \$5,000.00.

As appellant had previously received a schedule award for 18 percent bilateral loss of hearing, he was not entitled to another schedule award for the same impairment. However, as appellant noted, there was no reason that he should have known that the December 10, 1996 schedule award was not for an additional 18 percent loss of hearing. As appellant was not aware that he was not entitled to the schedule award and did nothing to cause this overpayment of

compensation, as noted above, appellant had previously informed the Office of his prior schedule award, the Office properly determined that appellant was without fault in the creation of the overpayment in the amount of \$11,410.29.

The Board further finds that the Office properly denied waiver of recovery of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.¹ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

"Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in the implementing federal regulations.

Section 10.322(a) of the implementing regulations² provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that (1) the individual from whom recovery is sought needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses, *i.e.*, monthly income does not exceed monthly expenses by more than \$50.00³ and (2) the individual's assets do not exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. For waiver under this standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$5,000.00.⁴

In the instant case, appellant provided an overpayment recovery questionnaire to the Office. The Office properly determined that appellant's assets including \$2,384.55 in savings,

¹ 5 U.S.C. § 8129(a).

² 20 C.F.R. § 10.322(a).

³ *Leticia C. Taylor*, 47 ECAB 198, 203 (1995).

⁴ *Id.*

and \$20,000.00 in other assets for a total of \$22,484.55 exceeded \$5,000.00 and that, therefore, his overpayment was not subject to waiver under the “defeat the purpose of the Act” standard.

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the implementing regulations provides that “Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments would be made, relinquished a valuable right or changed his position for the worse.” Appellant stated that he had spent the amount of the overpayment on a refrigerator and home repairs and that he would not have done so had he not believed that the schedule award was legitimate. There is no evidence that these actions resulted in a loss to appellant and that he was in a worse position financially than he would have been prior to receipt of the overpayment.⁵ Therefore, the evidence does not demonstrate that appellant relinquished a valuable right or changed his position for the worse in reliance on the erroneous schedule award which formed the basis for the overpayment.

As appellant has not shown that recovery would “defeat the purpose of the Act” or “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

The April 3, 1997 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
June 23, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ *Jesse T. Adams*, 44 ECAB 256, 262 (1992).